

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar**

Thursday, December 01, 2016

Hearing Room

5B

10:00 AM

8:10-10310 Robert A. Ferrante

Chapter 7

Adv#: 8:12-01330 Casey v. Ferrante et al

**#1.00 STATUS CONFERENCE Re: Third Amended Complaint
(set from trial setting conference hearing held on 8-25-16)**

Docket 724

***** VACATED *** REASON: CONTINUED TO 2-02-17 AT 10:00 A.M.
PER ORDER APPROVING STIPULATION TO CONTINUE STATUS
CONFERENCE ENTERED 11-18-16**

Tentative Ruling:

Tentative for 6/23/16:

This is the motion of Cygni Capital, LLC and Cygni Capital Partners, LLC (collectively "Cygni") for judgment on the pleadings under Rule 12(c). Defendant Ferrante joins in the motion but offers no additional substance. A motion for judgment on the pleadings may be granted only if, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001); *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). For purposes of a Rule 12(c) motion, the allegations of the non-moving party are accepted as true, and construed in the light most favorable to the non-moving party, and the allegations of the moving party are assumed to be false. *Hal Roach Studios, Inc. V. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989); *Fleming v. Pickard* at 925.

The Second Amended Complaint ("SAC") contains claims for turnover under section 542 and declaratory relief. The Trustee in the SAC alleges that Debtor has hidden and concealed assets in various shell entities, including Cygni, that are controlled by his associates as strawmen, and are established to perpetrate a fraud on Debtor's creditors. [SAC ¶ 39] It is alleged that many of these entities share the same office address. [Id. at ¶ 40]. In the turnover claim, the Trustee in the SAC alleges that the assets held by each of these entities are held for Debtor's benefit and that he possesses equitable title. [Id. at ¶ 75]. The Second Claim is for declaratory relief and

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seeks a determination that each of the entities is the alter ego of Debtor and the bare legal title of any assets can be ignored. [Id. at ¶ 83].

Movants argue that there is no "substantive alter ego" or "general alter ego" theory recognized under California law. Rather, movants argue that the alter ego doctrine as expressed in California is purely procedural, i.e. merely used to implement recovery on a separate theory of recovery. For this proposition movants cite *Ahcom, Ltd. v. Smeding*, 623 F. 3d 1248, 1251 (9th Cir. 2010). Movants also cite three other cases which they contend are the controlling authority in this area: (1) *Stodd v. Goldberger*, 73 Cal. App. 3d 827 (4th Dist. 1977); (2) *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290 (1985) and (3) *Shaoxing City Huayue Imp. & Exp. v. Bhaumik*, 191 Cal. App. 4th 1189 (2nd. Dist 2011). Movants argue that since the Trustee has not alleged some independent theory of recovery, such as fraudulent conveyance or conversion, there is no legally cognizable purpose for application of alter ego. Apparently, in movant's view, declaratory relief is not a suitably independent theory of recovery. The court is not so sure.

First, the court agrees that the law in this area is somewhat unclear, contradictory and bewildering to grasp in its full complexity. Attempting to order all the intricacies of "indirect outside piercing" and the like can give one a headache. However, since each of the authorities cited by the movants is distinguishable in one or more key aspects, and since each case decides a narrower and somewhat different problem from the one presented at bar, the court is not persuaded that the law is quite as limited and cramped as is now urged by the movants. To understand this conclusion, one must first consider the purpose of the alter ego doctrine, at least as it was classically formulated. This purpose is perhaps best expressed by the court in *Mesler v. Bragg Management*, one of movant's cited cases, concerning the allied doctrine of "piercing the corporate veil" :

"There is no litmus test to determine when the corporate veil will be pierced: rather the result will depend on the circumstance of each particular case. There are, nevertheless, two general requirements: '(1) that there be such unity of interest and ownership that the separate personalities of the

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corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." (Citing *Automotriz etc. de California v. Resnick* (1957) 47 Cal. 2d 792, 796). And 'only a difference in wording is used in stating the same concept where the entity sought to be held liable is another corporation instead of an individual. 'citing *McLoughlin v. L. Bloom Sons Co., Inc.*, 206 Cal. App. 2d 848, 851 (1962)...The essence of the alter ego doctrine is that justice be done. "What the formula comes down to, once shorn of verbiage about control, instrumentality, agency and corporate entity, is that liability is imposed to reach an equitable result...thus the corporate form will be disregarded only in narrowly defined circumstance and only when the ends of justice so require.'" (internal citations omitted)

38 Cal. 3d at 300-01

A similar sentiment was expressed in *In re Turner*, 335 B.R. 140, 147 (2005) concerning the related question of "asset protection" devices:

"However, an entity or series of entities may not be created with no business purpose and personal assets transferred to them with no relationship to any business purpose, simply as a means of shielding them from creditors. Under such circumstances, the law views the entity as the alter ego of the individual debtor and will disregard it to prevent injustice."

These statements accord with the court's general understanding. Corporate form is a privilege, not a right. Those who abuse the corporate form and disregard its separateness in their own activities and purposes can hardly expect the law to uphold the shield of separateness when it comes to the rights of creditors. And the court understands that the alter ego doctrine is an equitable remedy highly dependent upon and adaptable to the circumstances of each case. So the question becomes whether, as movants contend, the law in California has departed from these classic precepts in some way fatal to the Trustee's case. The court concludes that the answer is "no" for

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the following reasons.

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First, let us consider movants principal case, *Ahcom, Ltd. v. Smeding*. The facts of *Ahcom* are adequately stated at p. 6 of the Reply. But *Ahcom* is primarily a standing case. The defendant shareholders of the corporate judgment debtor argued that the judgment creditor had no standing to pursue them as alter egos of the debtor corporation as that was the sole domain of the bankruptcy trustee. The *Ahcom* court concluded that under those facts the shareholders' argument presumed that the trustee had a general alter ego claim precluding individual creditors from asserting the same. The *Ahcom* court goes on to note that "no California court has recognized a freestanding general alter ego claim that would require a shareholder to be liable for all of a company's debts and, in fact, the California Supreme Court state that such a cause of action does not exist." 623 F. 3d at 1252 citing *Mesler*, 216 Cal. Rptr. 443. But as noted above, there is other language in *Mesler* and cases cited by the *Mesler* court that seems supportive of the Trustee's theory that the doctrine of alter ego is adaptable to circumstances. Of course, our case is the inverse of *Ahcom*. In our case it is not an attempt to hold the debtor as a shareholder liable for the debts of the corporation, but rather to disregard the corporation altogether as a fraudulent sham. There is (or at least may be) in this a distinction with a difference. The Trustee's case can be construed not so much as an attempt to visit liability onto a corporation under a general alter ego claim but to urge that in justice and equity the corporate privilege should be withdrawn and disregarded altogether as a deliberate device to frustrate creditors. Although the opinions in *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (9th Cir. BAP 1997) and the similar *In re Davey Roofing, Inc.*, 167 B.R. 604, 608 (Bank. C.D. Cal. 1994) are roundly criticized in *Ahcom*, the court is not persuaded that *Ahcom* can be cited for the proposition that a fraudulent sham corporations need to be honored because the bankruptcy trustee lacks a "general alter ego" right of action, or that *Folks* is not good law, at least in some circumstances. This is a remarkable and unnecessary departure from what the court understands to be established law.

Mesler has already been discussed above. In the court's view, it is not properly

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cited for the proposition that there is no such thing as "general alter ego" claim under any circumstances. The actual holding of *Mesler* is that "under certain circumstances a hole will be drilled in the wall of limited liability erected by the corporate form: for all purposes other than that for which the hole was drilled the wall still stands." 39 Cal 3d at 301 In *Mesler* it was decided that a release of the corporate subsidiary did not necessarily release the parent who was alleged to be an alter ego. This merely reinforces the notion that alter ego is an equitable doctrine heavily dependent on circumstances and confined to what is necessary to effect justice.

Stodd v. Goldberger is likewise not determinative. It is more properly cited for a more limited proposition, i.e., that an action to disregard a corporate entity or to impose the debts of the debtor corporation upon its principal cannot be maintained absent some allegation that some injury has occurred *to the corporate debtor*. In this a trustee does not succeed to the various claims of creditors unless they are claims of the estate. But facts of *Stodd* are different from what is alleged in the case at bar. In effect, the Trustee here alleges that all of the assets of various sham entities belong in truth to the debtor and hence to the estate, and he seeks a declaratory judgment to this effect. Actually, *Stodd* includes at 73 Cal. App. 3d p. 832-33 a citation to the more general principles as quoted above that the two indispensable prerequisites for application of alter ego are: (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that if the acts are treated as those of the corporation alone, an inequitable result will follow. Citing *Automotriz etc. de California v. Resnick*, 47 Cal. 2d at 796. The Trustee's complaint would seem to fall well within those parameters.

Lastly, we consider *Shaoxing City Huayue Imp. & Exp. v. Bhaumik*. *Shaoxing* in essence merely repeats the holding of *Stodd* that an allegation giving the estate a right of action against the defendant is a prerequisite to imposition of alter ego liability. The plaintiff creditor sued the corporation ITC and included allegations that the shareholder, Bhaumik, was the corporation's alter ego. The shareholder's argument that the action was stayed by the corporation's bankruptcy, or that the creditor lacked standing in favor of the corporate bankruptcy trustee, failed for the

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same reasons articulated in *Stodd*, i.e., that the trustee has no standing to sue on behalf of creditors but must address wrongs *done to the corporation itself*. The *Shaoxing* court at 191 Cal. App. 4th at 1198-99 goes on to state the doctrine of alter ego as a procedural question thusly: "In applying the alter ego doctrine, the issue is not whether the corporation is the alter ego of its shareholders for all purposes, or whether the corporation was organized for the purpose of defrauding the plaintiff, but rather, whether justice and equity are best accomplished in a particular case, and fraud defeated, by disregarding the separate nature of the corporate form as to the claim in that case." citing *Mesler*, 39 Cal. 3d at 300. But the court does not read this to mean that in extreme cases (and this is alleged as an extreme case) the court cannot be called upon to consider the possibility that corporations and bogus entities, owned by straw men, cannot be called out for what they really are. Indeed, the language cited suggests that is still the case. Moreover, the court reads the Second Amended Adversary Complaint in this case as meeting all of the requirements. The particularized harm to the debtor, i.e. Ferrante (or more correctly his estate), is alleged to be in creation of bogus loans and artificial entities designed to create apparent (but not real) separation of the estate from its assets while preserving to the person of Ferrante and his family members (and not the estate) beneficial interest in very substantial assets which in truth and equity should be liquidated for his creditors. Trustee seeks a declaratory judgment to this effect. The principles of equity are not so constrained as to deny the Trustee access to the court in his attempt to unwind the alleged clever maze of overlapping and interrelated entities to get to the reality of the situation. All of the cases hold that application of the doctrine is dependent on the circumstances, and the circumstances here are that debtor has allegedly woven an almost impenetrable maze of entities. The Trustee seeks assistance from the court in separating reality from fiction. That is all that is required.

Lastly, the court should address what may be the most problematic authority cited by the movants (even though it was not described as one of the determinative cases). That is *Postal Instant Press, Inc. v. Kaswa Corporation*, 162 Cal. App. 4th 1510, 1518-20 (2008). The *Postal* court discusses "outside reverse piercing", i.e. "when fairness and justice require that the property of individual stockholders be

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made subject to the debts of the corporation..." (and presumably the reverse of same). In doubting that such a doctrine exists under California law, the *Postal* court discusses some of the inherent problems in disregarding the corporate form, such as impinging on the rights of innocent shareholders when the corporation is alleged to be the alter ego. Mostly the *Postal* court declined to embrace such a doctrine because there was a less invasive remedy available, i.e., levy upon the shares to exercise the rights the obligor shareholder might enjoy in the alleged alter ego corporation. The *Postal* court also held that in most inverse cases transfer of personal assets to the corporation by the shareholder could be dealt with under traditional claims of fraudulent conveyance and/or conversion. But, of course, ours is a different case and of an entirely different order. What is alleged here is a brazen and wholesale creation of numerous fraudulent entities operated for years by strawmen. Ferrante is alleged to have no shares that might be levied upon. And while it might be said that allegations of specific fraudulent transfers could have helped this case, the court does not read *Postal* or any of the other cases cited by movants to hold that in suitably extreme situations the court cannot assist in dismantling such a web of intrigue. Indeed, the *Postal* court at 162 Cal. App. 4th 1519 seems to acknowledge that in extreme circumstances there is room still for the traditional application of alter ego where adherence to the fiction of a separate corporate existence "would promote an injustice" to the stockholder's creditors." Citing *Taylor v. Newton*, 117 Cal. App. 2d 752, 760-61 (1953).

One more point should be made. On this question of whether there is a general alter ego right of action (or not) we need to remember context here. While the parties have all termed the discussion as one about limits under California law on the doctrine of alter ego, or "outside reverse piercing" and the like, it is easy to forget the primary purpose of a trustee in bankruptcy. The trustee is not just another creditor. He is uniquely charged with identifying, gathering and liquidating the assets of the estate. This is so that a dividend on the just claims of all creditors can be maximized. And where the equitable principles of the Code have been violated, the trustee must object to discharge. But trustees must from time to time confront clever debtors who are unwilling to report faithfully all that they hold. Elaborate schemes are sometimes resorted to and the various forms of fraud are infinite. Sometimes the nature and

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extent of the artifice is not so easy to discern or the date or amount of any transfer easily discovered. This court does not construe the equitable doctrine of alter ego to be so limited or confined as the movants have suggested. Instead, in the court's view it is (and must be) adaptable to the circumstances. It can be as simple as disregarding corporate form when to recognize it would be to perpetrate fraud and injustice. The cases cited by movants all pertain to a much more specific and limited circumstances on facts very different from the ones alleged at bar. None of the authorities say that all traditional equitable notions of disregarding corporate form when it is abused have been abrogated. Rather, the cases when properly read say that the law must evolve and adapt to the ingenuity of alleged fraudsters. So, it may be that under California law the alter ego doctrine is purely procedural, not substantive, but that does not in the court's view dictate a different result here as the procedure here is to implement the substantive claim for declaratory relief.

Deny

Party Information

Attorney(s):

Pacific Premier Law Group

Represented By
Arash Shirdel

Marilyn Thomassen

Represented By
Shawn P Huston
Marilyn R Thomassen

Creditor Atty(s):

Lt. Col. William Seay

Represented By
Brian Lysaght
Jonathan Gura

Debtor(s):

Robert A. Ferrante

Represented By
Richard M Moneymaker
Arash Shirdel

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Defendant(s):

Heritage Garden Properties, Inc.	Pro Se
Rising Star Development, LLC	Pro Se
American Yacht Charters, Inc.	Pro Se
Saxadyne Energy Management, LLC	Represented By Gary C Wykidal
Cygni Capital Partners, LLC	Represented By Gary C Wykidal Robert P Goe
Cygni Securities, LLC	Represented By Gary C Wykidal
Saxadyne Energy Group, LLC	Represented By Gary C Wykidal
Armani Robert Ferrante	Represented By Dennis D Burns Kyra E Andrassy Robert E Huttenhoff Ryan D ODea
Chanel Christine Ferrante	Represented By Dennis D Burns Kyra E Andrassy
Armani Ferrante, Gianni Ferrante,	Represented By Kyra E Andrassy
Gianni Martello Ferrante	Represented By Dennis D Burns Kyra E Andrassy
Systems Coordination &	Pro Se
Mia Ferrante	Represented By D Edward Hays Martina A Slocomb

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Steven Fenzl

Represented By
D Edward Hays
Martina A Slocomb

Envision Consultants, LLC

Pro Se

Rising Star Investments, LLC

Represented By
Marilyn R Thomassen

Traveland USA, LLC

Pro Se

Oscar Chacon

Pro Se

Robert A. Ferrante

Represented By
Robert E Huttenhoff
Ryan D ODea

Global Envision Group, LLC

Pro Se

Richard C. Shinn

Represented By
Shawn P Huston

Richard C. Shinn

Pro Se

Glinton Energy Group, LLC

Represented By
Gary C Wykidal

Glinton Energy Management, LLC

Represented By
Gary C Wykidal

Richard C. Shinn

Represented By
Marilyn R Thomassen

Envision Investors, LLC

Pro Se

CAG Development, LLC

Pro Se

Cygni Capital, LLC

Represented By
Gary C Wykidal
Robert P Goe

Interested Party(s):

United States Marshals Service

Pro Se

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Plaintiff(s):

Thomas H Casey

Represented By

Thomas A Vogeles

Thomas A Vogeles

Timothy M Kowal

Brendan Loper

Trustee(s):

Thomas H Casey (TR)

Represented By

Thomas A Vogeles

Brendan Loper

Thomas H Casey

Kathleen J McCarthy

Timothy M Kowal

Thomas H Casey (TR)

Represented By

Thomas H Casey

Thomas A Vogeles

Kathleen J McCarthy

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:13-20028 Tara Jakubaitis

Chapter 7

Adv#: 8:14-01007 Padilla, III v. Wecosign, Inc., et al

#2.00 STATUS CONFERENCE RE: Complaint: 1. Nondischargeability of debt under 11 USC 523; 2. Declaration relief under FRBP(9); 3. Injunction under FRBP 7001(7)
(cont'd from 10-13-16)

Docket 1

Tentative Ruling:

Tentative for 12/1/16:
No status report?

Tentative for 10/13/16:
Motion to Amend Complaint filed on September 20, 2016 without a hearing.
So when are we going to be at issue? Continue to date following.

Tentative for 8/11/16:
This was supposed to be resolved by summary judgment motion. What happened?

Tentative for 1/28/16:
Status conference continued to August 11, 2016 at 10:00 a.m. to allow hearing on summary judgment to be determined and then to evaluate effect on this case. The court is not pleased with the apparent failure of cooperation.

Tentative for 9/24/15:
Continue to January 28, 2016 to allow for Rule 56 motion, as appropriate.

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Tentative for 3/12/15:
Status conference continued to September 24, 2015 at 10:00 a.m.

Tentative for 9/25/14:
No updated status report? Has Superior Court ruled?

Tentative for 3/27/14:
Status conference continued to September 25, 2014 at 10:00 a.m. Court is inclined to allow Superior Court to make factual determinations, and if suitable findings are made, can be collateral estopped here.

Party Information

Debtor(s):

Tara Jakubaitis

Represented By
Christopher P Walker

Defendant(s):

Frank Jakubaitis

Pro Se

Tara Jakubaitis

Pro Se

PNC National, Inc.,

Pro Se

Wecesign, Inc.,

Pro Se

Wecesign Services, Inc.,

Pro Se

Plaintiff(s):

Carlos Padilla III

Represented By
Arash Shirdel

Trustee(s):

David L Hahn (TR)

Pro Se

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U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:13-11495 Point Center Financial, Inc.

Chapter 7

Adv#: 8:15-01089 Howard B. Grobstein, Chapter 7 Trustee v. CALCOMM CAPITAL, INC., a

#3.00 STATUS CONFERENCE RE: Third Amended Complaint for 91) Intentional Interference with Contractual Relations; (2) Turnover; (3) Avoidance of Pre-Petition Fraudulent Transfers; (4) Avoidance of Unauthorized Post-Petition Transfers; (5) Recovery of Pre-Petition Fraudulent Transfers and Unauthorized Post-Petition Transfers; (6) Breach of Fiduciary Duty (7) Aiding and Abetting Breach of Fiduciary Duty and (8) Declaratory Relief.
(cont'd from 8-25-16 per order approving stip. to cont. s/c entered 8-24-16)

Docket 83

***** VACATED *** REASON: CONTINUED TO FEBRUARY 9, 2017 AT
10:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE
ENTERED 11/17/16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Point Center Financial, Inc.

Represented By
Robert P Goe
Jeffrey S Benice
Carlos F Negrete

Defendant(s):

Lake Olympia Missouri City	Pro Se
Island Way Investments II, LLC	Pro Se
Michigan Avenue Grand Terrace	Pro Se
Olive Avenue Investors, LLC	Pro Se
Mission Ridge Ladera Ranch, LLC	Pro Se
Enterprise Temecula, LLC	Pro Se
Encinitas Ocean Investments, LLC	Pro Se

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Estancia Atascadero Investments,	Pro Se
Island Way Investments I, LLC	Pro Se
Georgetown Commercial Center,	Pro Se
Summerwind Investors, LLC	Pro Se
Spanish and Colonial Ladera	Pro Se
Van Buren Investors, LLC	Pro Se
Richard K. Diamond, solely in his	Pro Se
White Mill Lake Investments, LLC	Pro Se
Park Scottsdale, LLC	Pro Se
Palm Springs Country Club	Pro Se
Pinnacle Peak Investors, LLC	Pro Se
South 7th Street Investments, LLC	Pro Se
Provo Industrial Parkway, LLC	Pro Se
El Jardin Atascadero Investments,	Pro Se
RENE ESPARZA	Represented By Nancy A Conroy
M. Gwen Melanson	Represented By Nancy A Conroy
DOES 1-30, inclusive	Pro Se
6th & Upas Investments, LLC	Pro Se
16th Street San Diego Investors,	Pro Se
NATIONAL FINANCIAL	Represented By Nancy A Conroy
CALCOMM CAPITAL, INC., a	Represented By Nancy A Conroy
POINT CENTER MORTGAGE	Represented By

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	Carlos F Negrete
Dan J. Harkey	Represented By Nancy A Conroy Sean A Okeefe
NATIONAL FINANCIAL	Represented By Carlos F Negrete Sean A Okeefe
Champagne Blvd Investors, LLC	Pro Se
Capital Hotel Investors, LLC	Pro Se
Cobb Parkway Investments, LLC	Pro Se
Dillon Avenue 44, LLC	Pro Se
Deer Canyon Investments, LLC	Pro Se
Andalucia Investors, LLC	Pro Se
Altamonte Springs Church	Pro Se
Anthem Office Investors, LLC	Pro Se
Calhoun Investments, LLC	Pro Se
Buckeye Investors, LLC	Pro Se

Interested Party(s):

Courtesy NEF	Represented By Monica Rieder Roya Zur Murray M Helm Jeffrey G Gomberg Rachel A Franzoia
Richard K. Diamond	Represented By George E Schulman

Plaintiff(s):

Howard B. Grobstein, Chapter 7	Represented By
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John P Reitman
Rodger M Landau
Roye Zur
Monica Rieder

Trustee(s):

Howard B Grobstein (TR)

Represented By
Rodger M Landau
Roye Zur
Kathy Bazoian Phelps
John P Reitman
Robert G Wilson
Monica Rieder
Jon L Dalberg
Michael G Spector
Peter J Gurfein

Howard B Grobstein (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:16-13045 Zachary C Metcalf

Chapter 7

Adv#: 8:16-01196 Eagle Community Credit Union v. Metcalf

**#4.00 STATUS CONFERENCE RE: Complaint to Determine the Dischargeability of
Debt Pursuant to 11 USC Section 523(a)(2)(A)**

Docket 1

Tentative Ruling:

Tentative for 12/1/16:

Why did not defendant participate in the report?

Deadline for completing discovery: April 1, 2017

Last Date for filing pre-trial motions: April 24, 2017

Pre-trial conference on May 25, 2017 at 10:00 am

Party Information

Debtor(s):

Zachary C Metcalf

Represented By
Kevin J Kunde

Defendant(s):

Zachary C Metcalf

Pro Se

Joint Debtor(s):

Catrin Metcalf

Represented By
Kevin J Kunde

Plaintiff(s):

Eagle Community Credit Union

Represented By
Alana B Anaya

Trustee(s):

Karen S Naylor (TR)

Pro Se

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8:15-15626 Jessie Ann Mariann Chavez (Deceased)

Chapter 7

Adv#: 8:16-01198 Marshack v. Chavez

#5.00 STATUS CONFERENCE RE: Complaint to Avoid and Recover Fraudulent Transfer

Docket 1

***** VACATED *** REASON: CONTINUED TO 3-02-17 AT 10:00 A.M.
PER ORDER APPROVING STIPULATION TO FURTHER EXTEND
DEADLINE FOR DEFENDANT TO RESPOND TO COMPLAINT TO
AVOID AND RECOVER FRAUDULENT TRANSFER AND TO
CONTINUE STATUS CONFERENCE ENTERED 11-18-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Jessie Ann Mariann Chavez

Represented By
Sherry C Cross

Defendant(s):

Paula C. Chavez

Pro Se

Plaintiff(s):

Richard A. Marshack

Represented By
Kyra E Andrassy

Trustee(s):

Richard A Marshack (TR)

Represented By
Kyra E Andrassy

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar**

Thursday, December 01, 2016

Hearing Room

5B

10:00 AM

8:16-13873 Tho Van Phan

Chapter 11

Adv#: 8:16-01226 B.A.K. Precious Metals, Inc. v Phan

#6.00 STATUS CONFERENCE AND ORDER TO SHOW CAUSE RE: Notice of Removal of State Court Action to Federal Bankruptcy Court [Los Angeles County Superior Court Case No. BC629891]

Docket 1

Tentative Ruling:

This is a hearing on the court's OSC re remand on an action removed from the Los Angeles County Superior Court *B.A.K. Precious Metals, Inc. v. Tho Van Phan*, No. BC629891. The Plaintiff in the removed action, B.A.K. Precious Metals (hereinafter "Plaintiff") styles its response as a motion for remand as well as a response to the OSC. Accordingly, the court will construe this matter as a motion for remand.

Both sides agree that the court has at least "related to jurisdiction" within the meaning of 28 U.S.C. §157(a). Both sides cite to much of the same law on remand and the closely related concept of abstention. It is interpreting the 14 factors of cases like *Citigroup Inc. v. Pacific Investment Management Co. (In re Enron Corp.)*, 296 B.R. 505, 508 (C.D. Cal. 2003) and applying them to this case that the parties differ. Some of the factors clearly support remand such as extent to which state law predominates, unsettled nature of the law, burden on the bankruptcy court's docket, right to jury trial and possibly presence of non-debtor parties. But in the end the court believes the factor with the most weight is "effect or lack thereof on the efficient administration of the estate..." This is because, as debtor argues, it will likely be necessary to first determine whether liability exists on the claims before a reasonable plan of reorganization can be proposed. The theory for relief is the same as claims field by the Plaintiff. There will need to be an allowance determination in any event. While the court is often inclined to let the state court determine liability preceding allowance as a claim, this case may be different in that allegedly the liability alleged is a very large portion of the total of debtor's obligations. Moreover, the court is

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CONT...

Tho Van Phan

Chapter 11

generally not well disposed to delaying the reorganization effort while litigation drags on. In the court's view, reorganization cases are more likely successful when they are diligently prosecuted. So an earliest resolution is required here, and the possibility of an estimation under §503(c) should not be disregarded.

Deny remand.

Party Information

Debtor(s):

Tho Van Phan

Represented By
Michael R Totaro

Defendant(s):

B.A.K. Precious Metals, Inc.

Pro Se

Plaintiff(s):

Tho Van Phan

Represented By
Richard A Marshack
David Wood

**United States Bankruptcy Court
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10:00 AM

8:16-13873 Tho Van Phan

Chapter 11

Adv#: 8:16-01227 P&P Precious Metals, Inc v Phan

#7.00 STATUS CONFERENCE RE: Notice of Removal of State Court Action to Federal Bankruptcy Court [Los Angeles County Superior Court Case No. BC631034]

Docket 1

Tentative Ruling:

Tentative for 12/1/16:

Deadline for completing discovery: April 30, 2017

Last Date for filing pre-trial motions: May 22, 2017 (except remand which if sought must be heard by January 27)

Pre-trial conference on June 1, 2017

Party Information

Debtor(s):

Tho Van Phan

Represented By
Michael R Totaro

Defendant(s):

P&P Precious Metals, Inc.

Pro Se

Plaintiff(s):

Tho Van Phan

Represented By
Richard A Marshack
David Wood

**United States Bankruptcy Court
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10:00 AM

8:13-11495 Point Center Financial, Inc.

Chapter 7

Adv#: 8:15-01099 Howard B. Grobstein, Chapter 7 Trustee v. Ponce

#8.00 PRE-TRIAL CONFERENCE RE: (1) Anti-Slapp Motion to Strike the Complaint; and 92) Amended Motion for Order Dismissing with Prejudice all Claims for Relief Against Defendant Pursuant to F.R.C.P. 12(b)(6) (put on cal by order re: notice of status conf. entered 6-28-16) (set from s/c hrg held on 8-4-16)

Docket 0

***** VACATED *** REASON: CONTINUED TO 3-09-17 AT 10:00 A.M.
PER ORDER ON STIPULATION TO EXTEND PRE-TRIAL DATES
ENTERED 10-31-16**

Tentative Ruling:

Tentative for 8/4/16:
Deadline for completing discovery: November 7, 2016
Pre-trial conference on: December 1, 2016 at 10:00 a.m.
Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Point Center Financial, Inc.

Represented By
Robert P Goe
Jeffrey S Benice
Carlos F Negrete

Defendant(s):

Raymond E Ponce

Represented By
Nancy A Conroy

Plaintiff(s):

Howard B. Grobstein, Chapter 7

Represented By
Jon L Dalberg

Trustee(s):

Howard B Grobstein (TR)

Represented By

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CONT...

Point Center Financial, Inc.

Chapter 7

Rodger M Landau
Roya Zur
Kathy Bazoian Phelps
John P Reitman
Robert G Wilson
Monica Rieder
Jon L Dalberg
Michael G Spector
Peter J Gurfein

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5B

11:00 AM

8:15-10563 Aleli A. Hernandez

Chapter 13

Adv#: 8:15-01355 Asset Management Holdings, LLC v. JPMORGAN CHASE BANK, N.A. et

#9.00 Motion to Dismiss Plaintiff's Second Amended Complaint

Docket 68

Tentative Ruling:

This is Defendant JPMorgan Chase's ("Defendant") Rule 12(b) Motion to Dismiss Plaintiff Asset Management Holdings, LLC's second amended complaint, filed September 26, 2016. Debtor Leli Hernandez ("Debtor") filed a chapter 13 petition on February 2, 2015. Plaintiff is the holder of a second deed of trust against real property commonly known as 22851 Maiden Lane, Mission Viejo, CA 92629 ("Property"). This deed of trust has since been avoided (more correctly, valued for plan purposes), per an order of this court entered on July 31, 2015 effective on completion of Debtor's plan.

A. The Second Amended Complaint

Plaintiff second amended complaint appears to ultimately seek reversal of the order granting the motion to avoid lien under 11 U.S.C. 506(d). Plaintiff alleges that a novation has occurred. In support, Plaintiff alleges the following facts: A Note dated October 9, 2006, is signed by "Virgil Theodore Hernandez, individually" and "Virgil Theodore Hernandez, individually and as trustee of the Hernandez Family Trust Dated March 7, 2000." ("Note") *Second Amended Complaint at 3, paragraph 12h*. A deed of trust dated October 9, 2006 identifies Virgil Theodore Hernandez and Debtor as trustees of the Hernandez Family Trust Dated March 7, 2000. This deed of trust is signed by both Virgil Theodore Hernandez and Debtor, each in their capacity as individuals and as trustees for the Hernandez Family Trust, for each of their benefit. In addition, the deed of trust lists Metrocities as the beneficiary, with Mortgage Electronic Registration Systems, Inc. ("MERS") listed as nominee for Metrocities. Plaintiff alleges that this deed of trust was assigned to U.S. National Association, who is not Defendant. Therefore, Plaintiff alleges that Defendant was never assigned the deed of trust.

Plaintiff points to discrepancies in the naming of parties under the various agreements. Plaintiff states that the Modification Agreement attached to Defendant's proof

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of claim lists Chase Home Finance, LLC as the lender under the agreement. According to Plaintiff, Chase Home Finance, LLC is not Defendant. Further, Plaintiff argues that the Modification Agreement is not signed by the borrowers identified in the Note. Rather, the Modification Agreement is instead signed only by Virgil Hernandez, therefore substituting a new debtor for the old debtors. Finally, Plaintiff argues that because the Modification Agreement is not signed by the lender identified in the Note (Metrocities or U.S. Bank), the Modification Agreement has substituted one creditor for the old creditor. *Second Amended Complaint at 4, paragraph 30*. Finally, because the Modification Agreement has increased the principal amount, the Modification Agreement substitutes a new agreement in place of the old agreement evidenced by the Note. *Second Amended Complaint at 5, paragraphs 32-37*.

Plaintiff pleads facts it contends demonstrate that a novation has taken place resulting in Defendant now holding a junior position to Plaintiff's lien. If this is the case, then "the obligations under [Defendant's] Note no longer exist and/or are no longer enforceable." *Second Amended Complaint at 6, paragraph 50*. Plaintiff also alleges that because the Modification Agreement was entered into without notice to Plaintiff and without Plaintiff's consent, Plaintiff was prejudiced and harmed when the principal was increased. Therefore, Defendant's claim should be equitably subordinated to Plaintiff's claim.

Plaintiff also seeks partial equitable subordination if the court finds that there was no novation. Plaintiff argues that under the terms of the Note, the Defendant had actual and constructive notice that the balance secured by the deed of trust would not exceed the amount of \$979,000. Thus, because the Modification Agreement increased the principal amount to \$1,035,513.37, the "amount secured by the Deed of Trust should be subordinated to the debt secured by Plaintiff's second priority deed of trust..." *Second Amended Complaint at 8, paragraph 70*. Finally, Plaintiff argues that it is entitled to damages because the Loan Modification increased the principal balance above the 110% cap indicated in the terms of the Note. According to Plaintiff, if the cap were recognized, the principal could not exceed \$979,000. Because payments of \$50,887.61 have been made, the deed of trust therefore secures no more than \$928,112.39. Accordingly, because the motion to avoid lien found the Property to be worth \$950,000, Plaintiff's lien should not have been avoided.

B. Pleading Requirements

Fed. R. Civ. P. Rule 8 requires that a pleading must contain a "short and plain

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Chapter 13

statement of the claim showing that the pleader is entitled to relief." A pleading that does not state a claim upon which relief can be granted may be dismissed by the respondent pursuant to Fed. R. Civ. P. Rule 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (1955)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A pleading that merely "offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do." *Id.* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice").

"A complaint should not be dismissed under the rule 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also, *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir.1978). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985), cert. denied, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 773 (1986). If a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint. *Amfac Mortgage Corp.*, 583 F.2d at 429. These documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim." *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

C. First Claim for Relief

Cal. Civ. Code §§ 1530 and 1531 provides:

"Novation is the substitution of a new obligation for an existing one. Novation is made: (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; (2) By the substitution of a new debtor in place of the old one, with intent to release the latter; or, (3) By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

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Plaintiff argues that the facts demonstrate a novation has in fact occurred. But the documents attached as Exhibit 1 to Plaintiff's second amended complaint (these documents are Defendant's Proof of Claim, which is attached to the Motion to Dismiss as Exhibit 1) appear not to support Plaintiff's contention. Under paragraph 3, subsection "D" of the Modification Agreement, the Modification Agreement expressly states "[t]hat all terms and provisions of the Loan Documents, except as expressly modified by this Agreement, remain in full force and effect; nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents...". As argued by Defendant, this language cuts against Plaintiff's argument that a novation has occurred, as the Modification Agreement states that it is not supplanting prior Loan Documents, and that there is no release of the obligations in the Loan Documents. Accordingly, because the language contradicts the Plaintiff's factual contentions, Plaintiff at this juncture has not sufficiently pled facts that a novation took place when Debtor's husband signed the Modification Agreement. As currently alleged, no plausible case on this theory is stated.

D. Second Claim for Relief

Plaintiff also alleges that there are issues regarding chain of title i.e. that the Deed of Trust was never properly assigned to Chase and that the claim should be disallowed under 11 U.S.C. § 502(b)(1). It is unclear from the documents attached to Plaintiff's second amended complaint whether Plaintiff's allegation is true or false. Plaintiff's Exhibit 1 at 23 includes a Deed of Trust listing Virgil Theodore Hernandez and Debtor, as trustees of the Hernandez Family Trust, as borrowers, with the Lender listed as Metrocities Mortgage. This deed of trust is dated October 10, 2006. Fidelity is listed as the trustee of the deed of trust, and MERS is listed as a nominee for Metrocities Mortgage. An assigned deed of trust is attached to Plaintiff's second amended complaint as Exhibit 2. This assignment is dated at October 14, 2009, and "grants, assigns, and transfers to JPMORGAN CHASE BANK, NATIONAL ASSOCIATION all beneficial interest under that certain Deed of Trust dated October 10, 2006. Fidelity is again listed as trustee of the deed of trust. However, another assignment of deed of trust dated August 23, 2010 states that the "undersigned [Defendant] hereby grants, assigns, and transfers to U.S. Bank National Association as successor trustee to Bank of America N.A...all beneficial interest under that certain Deed of Trust dated October 9, 2006. It is unclear here from the language whether U.S. Bank was assigned as trustee, or whether U.S. Bank was assigned the rights as a beneficiary under the deeds of trust. While the

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language of the deed of trust seems to transfer to U.S. Bank National Association in their capacity as trustee, the language also seems to provide that U.S. Bank National Association is receiving a beneficial interest under the deed of trust, which suggests that U.S. Bank National Association, rather than Defendant, is the beneficiary of the deed of trust.

A Corporate Assignment of Deed of Trust, which can be found attached as Exhibit 1 at 54, further obfuscates the issue. This is dated April 14, 2012, and purports to transfer to U.S. Bank National Association the rights of trustee of the deed of trust. In addition, the deed of trust also states that Defendant is responsible for receiving payments, which suggests that the assignment of deed of trust dated August 23, 2010 never did assign beneficial interest to U.S. Bank Association. This understanding seems to be most plausible. However, as mentioned above, the assignments don't appear to clearly demonstrate that Defendant has a beneficial interest under the deed of trust and can therefore file a proof of claim. Thus, because a motion to dismiss requires one to assume the allegations of material fact are true and because Plaintiff has sufficiently pled facts that are not clearly contradicted by its supporting documents, Plaintiff's second claim for relief should not be dismissed.

E. Third and Fourth Claim for Relief

Plaintiff's primary argument for equitable subordination is that Defendant entered into the Modification Agreement with Hernandez, improperly increasing the principal amount owed. Because the Modification Agreement has increased the principal beyond the capped amount provided for in the original terms of the Note, Plaintiff was not on notice and has been harmed and prejudiced by the increase in principal.

"The judge-made doctrine of equitable subordination predates Congress's revision of the Code in 1978...[T]he application of the doctrine [is] generally triggered by a showing that the creditor had engaged in 'some type of inequitable conduct' ...[The Fifth Circuit has also] discussed two further conditions relating to the application of the doctrine: that the misconduct have 'resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant,' and that the subordination 'not be inconsistent with the provisions of the Bankruptcy Act.'" *United States v. Noland*, 517 U.S. 535, 539 (1996).

Here, it appears that Plaintiff has met the pleading requirements. Defendant's conduct could be construed as inequitable, as Plaintiff was without notice that the Defendant's principal could increase past the cap stated in the note. Further, Plaintiff has

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Aleli A. Hernandez

Chapter 13

pled the fact that Defendant never obtained its consent. Additionally, Plaintiff has also stated the they have been harmed, because "had Chase not entered the Loan Modification, Plaintiff's lien against the...Property would be at least partially secured and would not have been avoided pursuant to the Avoidance Order." *Second Amended Complaint at 7, paragraph 63*. Again, because Defendant altered the cap on the principal so that the principal increased without Plaintiff's knowledge beforehand, it would not seem inconsistent with the provisions of the Bankruptcy Code to find that Defendant received an unfair advantage that could be subject to equitable subordination. Whether these are the kind of egregious acts as discussed in the more modern equitable subordination cases remains a subject of proof. But Plaintiff has pled sufficient facts that could plausibly lead to relief. So dismissal by Rule 12(b) motion is not appropriate.

F. Fifth and Sixth Claim for Relief

Plaintiff's fifth claim seeks damages relating to the Modification Agreement, and Plaintiff's sixth claim seeks relief from the avoidance order. The same facts discussed in section "E" above would also seem to support the notion that these claims for relief have been adequately pled. Accordingly, these claims for relief should not be dismissed.

Defendant has argued that because this court has valued the Property at \$950,000 and because the original Note capped the principal at \$979,000, Plaintiff's argument is irrelevant because its trust deed would have been avoided anyway. However, Plaintiff has also asserted that payments totaling \$50,887.61 toward the principal amount have been made, which could potentially place prevent Plaintiff's lien from being entirely avoided had Defendant not entered into the Modification Agreement. As argued by Plaintiffs, this figure could help the court determine damages suffered by Plaintiffs from the Modification Agreement. Whether this adjustment can or should be figured retroactively is likely not something that must be decided at the pleadings stage under a Rule 12(b) motion.

The motion regarding Plaintiff's first claim for relief based on novation is granted with thirty days to amend. The remaining portions are denied.

Party Information

Debtor(s):

Aleli A. Hernandez

Represented By
Tate C Casey

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Chapter 13

Defendant(s):

Aleli A. Hernandez

Pro Se

JPMORGAN CHASE BANK, N.A.

Represented By

Sheri Kanesaka

Heather E Stern

Rafael R Garcia-Salgado

Bryant S Delgadillo

Virgil Theodore Hernandez and

Pro Se

Virgil Theodore Hernandez

Pro Se

Plaintiff(s):

Asset Management Holdings, LLC

Represented By

Vanessa M Haberbush

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

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11:00 AM

8:13-11495 Point Center Financial, Inc.

Chapter 7

Adv#: 8:16-01041 Howard Grobstein, as Chapter 7 trustee v. NATIONAL FINANCIAL

**#10.00 STATUS CONFERENCE RE: Complaint for Avoidance and Recovery of
Fraudulent Transfers or, in the Alternative Avoidance and Recovery of
Preferential Transfers
(cont'd from 9-29-16 per order approving stp. to cont entered 8-31-16)**

Docket 1

***** VACATED *** REASON: CONTINUED TO FEBRUARY 9, 2017 AT
11:00 A.M. PER ORDER APPROVING STIPUATION ENTERED 11/17/16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Point Center Financial, Inc.

Represented By
Robert P Goe
Jeffrey S Benice
Carlos F Negrete

Defendant(s):

NATIONAL FINANCIAL

Pro Se

Plaintiff(s):

Howard Grobstein, as Chapter 7

Represented By
Roye Zur

Trustee(s):

Howard B Grobstein (TR)

Represented By
Rodger M Landau
Roye Zur
Kathy Bazoian Phelps
John P Reitman
Robert G Wilson
Monica Rieder

**United States Bankruptcy Court
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CONT... Point Center Financial, Inc.

Chapter 7

Jon L Dalberg
Michael G Spector
Peter J Gurfein

Howard B Grobstein (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

United States Bankruptcy Court
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Santa Ana
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11:00 AM

8:13-11495 Point Center Financial, Inc.

Chapter 7

Adv#: 8:16-01041 Howard Grobstein, as Chapter 7 trustee v. NATIONAL FINANCIAL

**#11.00 Motion to Dismiss Complaint
(cont'd from 9-29-16 per order approving stip. to cont. entered 8-31-16)**

Docket 8

***** VACATED *** REASON: CONTINUED TO FEBRUARY 9, 2017 AT
11:00 A.M. PER ORDER APPROVING STIPUATION ENTERED 11/17/16**

Tentative Ruling:

- NONE LISTED -

Party Information

3rd Party Defendant(s):

Richard Diamond

Represented By
Aaron E de Leest

Debtor(s):

Point Center Financial, Inc.

Represented By
Robert P Goe
Jeffrey S Benice
Carlos F Negrete

Defendant(s):

NATIONAL FINANCIAL

Pro Se

Interested Party(s):

Courtesy NEF

Represented By
Rodger M Landau
Monica Rieder
Jack A Reitman
Rachel A Franzoia

Plaintiff(s):

Howard Grobstein, as Chapter 7

Represented By
Roye Zur

**United States Bankruptcy Court
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CONT... Point Center Financial, Inc.

Chapter 7

Trustee(s):

Howard B Grobstein (TR)

Represented By

Rodger M Landau

Roye Zur

Kathy Bazoian Phelps

John P Reitman

Robert G Wilson

Monica Rieder

Jon L Dalberg

Michael G Spector

Peter J Gurfein

Howard B Grobstein (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

**United States Bankruptcy Court
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Thursday, December 01, 2016

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2:00 PM

8:13-18057 Banyan Limited Partnership, a Nevada limited partn

Chapter 7

#12.00 Chapter 7 Trustee's Motion for Order Approving Purchase and Settlement Agreement Pursuant to Federal Rule of Bankruptcy Procedure 9019 and 11 U.S.C. Section 363.
(cont'd from 11-01-16)

Docket 94

Tentative Ruling:

Tentative for 12/1/16:

This is Trustee Thomas H. Casey's ("Trustee") motion for an order approving the purchase and settlement agreement ("Agreement") entered into between the Trustee, Dan Baer ("Baer"), and IBT International ("IBT"). Trustee is the chapter 7 trustee for the jointly administered bankruptcy estates of Banyan Limited Partnership, Pear Tree Limited Partnership, and Orange Blossom Limited Partnership (collectively "Debtors"). The Agreement provides for the sale and assignment of a State Court Judgment held by Debtors to Baer or his assignee for the price of \$425,000 subject to overbid (Trustee states that the purchase price may potentially be adjusted). Further, the Agreement provides that the claims held by Baer and IBT will be subordinated, therefore resulting in increased distribution to other claims. The Agreement also resolves all litigation regarding the State Court Judgment and the involuntary bankruptcy case commenced by Trustee against IBT. Trustee argues in order to recover on the State Court Judgment he would have to engage in highly risky, lengthy, and expensive litigation. In sum, Trustee contends that this Agreement would prevent further spending of estate resources and ultimately is in the best interest of the estate and its creditors. It is opposed by Mr. Dennis Hartman, a lawyer, who has represented the Debtors over several years of litigation against Baer and IBT.

This matter was originally scheduled for hearing November 1, 2016. Upon *ex parte* motion of Mr. Hartmann based on his busy trial schedule and unavailability, the court continued the matter for a month to its current date. Mr. Hartmann's Opposition was by the court's order due not later than November 14, 2016 by 5:00 p.m. The

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Banyan Limited Partnership, a Nevada limited partn

Chapter 7

Opposition was filed late, on November 15. Much of the Opposition was based on the argument the Agreement would be premature as a conversion motion (from Chapter 7 to 11) was forthcoming. Such a motion was eventually filed, ostensibly by the debtor, on November 26. However, this conversion motion (charitably put) is "bare bones" and is not supported by any points and authorities. Instead Mr. Hartmann filed a "Rebuttal" on November 28, 2016 late evening, a courtesy copy of which was not given to the court until today, November 30, at around 1:00 p.m.(after a colloquy with chambers staff). The Rebuttal is a massive document supported by over a hundred pages (est.) of exhibits, transcripts and materials. Despite the imposition of these late filings, the court has reviewed all of the pleadings and skimmed through the exhibits, as much as time would allow.

A. Background

It is necessary to briefly recount the long, tortuous history. Debtors filed voluntary chapter 7 petitions on September 27, 2013, with Trustee appointed as the chapter 7 trustee for each of the Debtors' estates. Debtors each hold a judgment ("State Court Judgment") against IBT. The State Court Judgment was entered against IBT on November 15, 2011 and was affirmed on appeal. As of June 8, 2015 the total sum of \$4,714,962 is owed under The State Court Judgment to Debtors. Trustee asserts that the State Court Judgment is likely the only asset that can be liquidated for the benefit of creditors.

IBT filed a general unsecured claim ("IBT claim") against each of the Debtors for \$411,281.51 based on a judgment and sanctions entered against Debtors for the filing of a prior involuntary bankruptcy case ("Bankruptcy Judgment"). Related entity Southern California Sunbelt Developers ("SCSD") also filed a general unsecured claim against each of the Debtors. Each SCSD claim against Banyan and Orange Blossom is for \$573,514.18 plus prejudgment interest and punitive damages. The SCSD claim against Pear Tree is slightly less, totaling \$251,500 plus prejudgment interest and punitive damages (collectively referred to as "SCSD claims"). Baer, principal of IBT, also filed a general unsecured claim against each of the Debtors for \$219,329.70 for legal expenses and costs (Baer claim, IBT claim, and SCSD claim

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CONT... **Banyan Limited Partnership, a Nevada limited partn**
collectively referred to as "Baer Entity claims").

Chapter 7

Trustee filed an involuntary petition against IBT based on the State Court Judgment on June 8, 2015. IBT filed its answer to the petition on July 2, 2015 and later filed a motion to dismiss the involuntary petition on April 8, 2016. The motion to dismiss was fully briefed and argued, with ruling on the motion to dismiss and involuntary case currently being held in abeyance pending the approval of this Agreement. The parties had previously attempted to reach a settlement regarding the State Court Judgment and involuntary case but were unable to reach an agreement. The parties then decided to attend mediation on January 26, 2016. Although the mediation lasted all day, no settlement was reached. On May 3, 2016, the parties argued the motion to dismiss before the Hon. Erithe A. Smith, with the court taking the matter under submission (and later allowing the matter to be held in abeyance, pending approval of this Agreement). The parties continued settlement discussions culminating in this Agreement.

B. Rule 9019 and Sale Standards

Trustee argues that the Agreement is in the best interest of the estate because it avoids extensive litigation and because the terms of the Agreement will allow for a higher distribution to creditors (especially general unsecured creditors) through the subordination of the Baer Entity claims. Trustee further contends that because the Agreement allows for overbids, Trustee is ensuring that he is obtaining the best possible price for the estate. Finally, Trustee asserts that the Agreement was reached in good faith, as the Agreement is the product of prolonged negotiations and efforts by all parties. In sum, Trustee requests that the court approve the Agreement under 9019 and the sale provided for in the Agreement under 11 U.S.C. § 363.

"In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider: (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper

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deference to their reasonable views in the premises." *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986). "In addition, while creditors' objections to a compromise must be afforded due deference, such objections are not controlling...and while the court must preserve the rights of the creditors, it must also weigh certain factors to determine whether the compromise is in the best interest of the bankrupt estate." *Id.* at 1382. In short, "[t]he law favors compromise and not litigation for its own sake[.]" *Id.* at 1381. It bears mentioning that the State Court Judgment is itself the product of over a decade of protracted and hugely expensive litigation between Mr. Hartmann and the Baer parties. Mr. Hartman admits that he has spent enormous efforts in getting this far, but collections to date have proven elusive.

"A trustee may sell property of the estate other than in the ordinary course of business after notice and a hearing...The requirements of § 363(b) are designed to protect creditors' interests in the assets of the estate. *In re 240 N. Brand Partners, Ltd.*, 200 B.R. 653, 659 (9th Cir. B.A.P. 1996). A bankruptcy court can authorize the sale of substantially all of the assets of the estate under § 363(b) upon a proper showing that the sale is in the best interests of the estate, that there is a sound business purpose for the sale, and that it was proposed in good faith. See *id.* at 659; *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991); *In re Lionel*, 722 F.2d 1063, 1070 (2nd Cir. 1983)." *In re Kellogg-Taxe*, 2014 WL 1016045, at *4 (Bankr. C.D. Cal. Mar. 17, 2014).

The Agreement provides for sale of Debtors' interest in the State Court Judgment. Before the Agreement can be approved, the threshold question of whether Trustee can sell the property must first be addressed. As mentioned earlier, the court must find that the sale is in the best interests of the estate, that there is a sound business purpose for the sale, and that the sale was proposed in good faith. Here, these requirements both for sale and for Rule 9019 compromise appear to have been met.

The sale will resolve the pending litigation between the parties, which will allow for creditors to receive distributions sooner. Additionally, the distributions may be higher because administrative fees will be lower with the litigation resolved. Accordingly, there appears to be a sound business purpose for the sale, and the sale

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seems to be in the best interest of the estate. The facts here also weigh in favor of finding that the sale was reached in good faith. Trustee has presented facts that demonstrate the parties have been involved in highly contentious litigation. Given the past adversarial relations between the parties, it seems unlikely that the parties engaged in anything but arms-length negotiations. The fact that the parties engaged in lengthy negotiations, as well as a day-long mediation meeting, all point to the fact that the sale price and terms reached by the parties is the product of good faith negotiations.

But the court must also give deference to the opinions of creditors, especially Mr. Hartmann, and so analyzes further below. The next question is whether the Agreement itself should be approved as a compromise. We examine *the A & C Properties* factors:

1. The Probability of Success in the Litigation

According to Trustee, success in the litigation between the parties is uncertain. The facts here seem to support this assertion. Trustee has already argued a motion to dismiss the involuntary case; but the Trustee does not appear to know the outcome with certainty. Mr. Hartmann argues that the outcome is likely favorable if Judge Smith merely "follows the law." But the court suspects it is not as clear as Mr. Hartmann would have it and the Trustee seems to harbor legitimate doubts. And then there is the question of whether IBT, the alleged debtor, is "generally not paying its debts as come due," the prerequisite for maintaining an involuntary petition. This is obviously true respecting the State Court Judgment, but whether this qualifies as "generally" might not be as clear-cut as Mr. Hartman would have it. Trustee is apparently concerned he would not be able to successfully pursue equitable subordination through the Bankruptcy Code, and unless subordinated the Cook Island liens may absorb all of the value of IBT. Some of this uncertainty may arise because the dubious trust deed to the Cook Islands Trust entity posing as lender here pre-existed not only the State Court Judgment, but also the transactions that led to the liability. This is, of course, will involve a whole new layer of litigation. Because of the difficulty in forecasting the results of the litigation between the parties, the near

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certainty of extended delays and expense (from an estate with no liquid assets) and because of the likelihood of appeals, this factor weighs in favor of approving the Agreement.

2. The Difficulties to be Encountered in Collection; and The Complexity, Expense, Inconvenience, and Delay of the Litigation

And then, even assuming success on the involuntary, there is the question of collection. There appear to be numerous obstacles to collecting the State Court Judgment, as there appears to be only one asset of IBT (the ranch) but that is "encumbered" (at least ostensibly so) by two lienholders making collection more difficult. As mentioned earlier, the litigation between the parties appears to be incredibly complex with lots of moving parts; Trustee is currently managing the jointly administered bankruptcy estates of Debtors, is involved in an involuntary bankruptcy case, and may also have to further pursue action in state court. Moreover, the parties have all demonstrated a willingness to litigate these matters fully and engage in scorched earth tactics. All of this must be considered from the Trustee's standpoint since reportedly the estate is without funds to finance litigation. Accordingly, these factors all weigh in favor of approving the Agreement.

3. The Interests of the Creditors

Trustee's argument here appears to have at least some merit. By reducing the amount of litigation, the estate will incur less administrative expenses which in turn will allow for a higher distribution to creditors. The terms of the Agreement also appear to benefit unsecured creditors, as certain claims under the Agreement will be subordinated to allow for a higher *pro rata* distribution to non-Baer creditors. Finally, the overbid procedures provide some comfort that the State Court Judgment will be sold for a reasonable price. If this were the obviously terrible, one-sided deal that Mr. Hartmann, a lawyer, has described then one might expect he might have arranged financial backing to acquire the right of action for only slightly more than is offered, so he could be free to continue the crusade into another decade.

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To clarify, the court harbors no naiveté about the obviously dubious Cook Islands trust deed. In the court's experience, persons dealing through Cook Islands entities are usually up to some sort of mischief to avoid their debts; this is pretty much the *raison d' être* for any Cook Islands trust. The problem is that in a court of law we must rely on evidence and what can be proved, not what is implied or only upon what smells bad. The court also understands Mr. Hartmann's frustration having invested so much of his time (15 years) and effort to date, only to see those around him such as the Trustee tire of the effort or view matters more dispassionately. But in the end that is the Trustee's job; to make hard decisions based on a hard-nosed evaluation of the economics. Bankruptcy estates do not exist primarily to do right and justice. One always hopes, of course, but the world and our legal system are not perfect. Scoundrels and sharp dealers do prosper, despite what you might have heard as a child. Bankruptcy estates exist primarily so that the assets of bankrupts can be equitably distributed without unreasonable delay. In this the court cannot say that the Trustee's decision is outside the realm of reasonableness, and that is all that is necessary to approve this compromise.

Grant

No tentative. See #8.

Party Information

Debtor(s):

Banyan Limited Partnership, a

Represented By
Hutchison B Meltzer

Trustee(s):

Thomas H Casey (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

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**#13.00 Motion to Continue Hearing On Motion For Order Approving Purchase And
Settlement Agreement
(Cont'd from 11-01-16)**

Docket 102

Tentative Ruling:

Tentative for 12/1/16:
See #12.

Opposition, if any, can be heard at the hearing. The trustee should be heard
on the question of the downside (if any) of a postponement of the hearing.

Party Information

Debtor(s):

Banyan Limited Partnership, a

Represented By
Hutchison B Meltzer

Trustee(s):

Thomas H Casey (TR)

Represented By
Beth Gaschen
Jeffrey I Golden